IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

BENJAMIN CAIN,
doing business as
CAIN'S TRUCK LINES,
Petitioner

v.

CLARA BOWLBY,
Respondent

No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit was filed September 3, 1940 (R. 203-214), and will be reported in 114 Federal (2) 519.

II.

STATEMENT OF THE CASE

The statement of the case has been, we think, adequately covered in the petition for certiorari, and in the interest of brevity is not repeated here.

III.

THE QUESTION INVOLVED

As said in the petition for certiorari, the sole question here presented is whether the driver of a motor freight truck, which was being operated as a common carrier of freight for hire, falls within the phrase "driver of any stagecoach or other public conveyance," and whether the majority of the Honorable Circuit Court of Appeals erred in holding that such driver is within such classification and that said penal death statute of New Mexico (36-101) is applicable to respondent's claimed action for the death of her husband, rather than the general death statute (Section 36-102), which under Section 36-104 can be enforced only by the personal representative of the estate of decedent.

IV.

ARGUMENT

The sole question presented involves the construction of the New Mexico penal death statute, namely, Chapter 36, Section 101, of the New Mexico Compiled Statutes, 1929, as amended by Chapter 19, Laws of 1931, that is, whether respondent's alleged cause of action for the death of her husband is properly based upon said statute, or

whether, as petitioner contends, such cause of action should have been based upon Section 36-102 of the New Mexico Compiled Statutes, 1929, which is enforceable only by a personal representative of the estate of the deceased. Section 36-101 provides that an action may be brought under it by the surviving wife, and sets an arbitrary forfeiture or penalty of $7,500, while the general death statute (Article 36-102) provides for such compensatory damages as may be proved to have been suffered, and the action under the latter statute may be brought only by the personal representative of the estate of deceased. *Romero v. Atchison, Topeka & Santa Fe Railway Company*, 11 N. M. 679, 72 Pac. 37; *Whitmer v. E. P. & S. W. Co.* (C. C. A. 5th) 201 F. 193. In other words, if, as petitioner contends, respondent has brought her action for the death of her husband under the wrong statute she was not entitled to recover the specific penalty of $7,500, and could not, in her individual capacity as surviving widow, maintain her action at all.

For the convenience of this Honorable Court, there is set out in the appendix hereto the original act of the legislature of the Territory of New Mexico, approved February 18, 1882, omitting certain sections immaterial here. There is also copied the act of the legislature of the Territory of New Mexico approved February 21, 1891, which is now substantially embodied in Sections 36-102 and 36-104 of the Compiled Statutes of New Mexico, 1929. There is also copied chapter 19 of the Laws of 1931 of the State of New Mexico, approved March 10, 1931, which is the statute upon which respondent based her cause of action for the death of her husband.

It is, of course, elementary that at common law no action

would lie for the wrongful death of a human being, and such was the rule generally in the United States and in England until the passage of the famous act of Parliament known as Lord Campbell's Act. After the passage of Lord Campbell's Act, the same was widely imitated in the United States, thus creating a cause of action, or right of action which had not theretofore existed. In construing such statutes, it has been the general rule that they must be strictly construed because they are in derogation of common law. *Insurance Company v. Brame*, 95 U. S. 754; *The Harrisburg*, 119 U. S. 199; *Martin v. Baltimore & Ohio Railroad Company*, 151 U. S. 673; *Michigan Central Railroad Company v. Vreeland*, 227 U. S. 59; *St. Louis & Iron Mountain Railroad v. Craft*, 237 U. S. 648; *Romero v. Atchison, Topeka & Santa Fe Railway Company*, 11 N. M. 679, 72 Pac. 37.

Said Section 36-101 has been held to be in derogation of the common law and it is, therefore, to be strictly construed. *Romero v. Atchison, Topeka & Santa Fe Railway Company*, 11 N. M. 679, 72 Pac. 37; *El Paso Cattle Loan Company v. Hunt*, 30 N. M. 157, 228 Pac. 888.

In the Romero case, the Supreme Court of the Territory of New Mexico said:

> "It will be admitted that at common law no action would lie for an injury caused by the death of a human being. If a right of action now exists, therefore, it must be by virtue of legislative enactment. The subject of death by wrongful act has been brought to the attention of the legislative department of this territory on at least three different occations, and statutes have been enacted, which in determining this case, it becomes our duty to examine, as a right of action, if any exists, must be found in these enactments.";

and further in the opinion the court said:

> "This statute, being in derogation of the common law, must be *strictly construed.*";

and further in the opinion it said:

> "In our opinion, the intention of the legislature in the passage and amendment of the statutes under consideration in this case is apparent from a reading of them, and was as declared in the former part of this opinion, and therefore the terms of the statute should be strictly adhered to. Counsel for appellant contends that this statute is remedial in its nature, and should be liberally construed; but, without concurring in the views of counsel, it is proper to say that there can be no such liberality indulged in as would authorize the court, in the name of construction, to change the plain terms of an unambiguous statute so as to provide a remedy which under the statute does not exist."

In *Whitmer v. El Paso & Southwestern Company,* 201 Federal 193, the distinction between the two death statutes of New Mexico is clearly recognized and strictly and properly applied. In that case, an action was brought for the death of a child stepping into a hole in a railroad bridge while walking across it pursuant to a habitual custom of children and adults to walk over the bridge. The action was brought by the administrator under then Section 3214 (now Sections 36-102, 36-104), instead of under then Section 3213 (now Section 36-101). The contention was made that the action should not have been brought by the personal representative but should have been brought by the named beneficiaries under the first statute, now 36-101, but the court overruled such contention.

Thus when the provisions of the "Railroad and Stage Coaches" act are analyzed, the mere fact that he who

caused a death is a common carrier is not sufficient to create a liability under the act. To create a liability under the statute, the death must have resulted from "the negligence, unskillfulness or criminal intent of an officer, agent, servant of employee *whilst running, conducting or managing any locomotive, car or train of cars or any driver of any stage coach or other public conveyance.*"

The New Mexico legislature has said in effect: "that only those common carriers operating railroads and stage coaches shall be liable for forfeiture and penalties for wrongful death occasioned by the negligence of their agents, servants and employees while running locomotives, trains and stage coaches, while other persons, including common carriers, not running locomotives, trains or stage coaches shall be liable to a personal representative of the deceased for such damages as the jury may deem fair and just."

Judge Bratton, in writing the majority opinion of the court below, recognized the foregoing rule but simply disregarded it and failed to apply it, as he should have done under the holdings of this Honorable Court in the cases of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1187; *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 82 L. Ed. 1290; *Cities Service Oil Company v. Dunlap*, 60 S. Ct. 201. In the course of his opinion, Judge Bratton said that the penal death statute (36-101) was in general and comprehensive terms and prospective in operation, and therefore applied to petitioner's motor freight truck and driver. In the name of construction, he changed the plain terms of the statute so as to provide a remedy which under the statute does not exist.

Certain it is that petitioner's motor freight truck was not a locomotive, car or train of cars, and neither was it a stage-coach. Therefore, said statute 36-101, without extending its plain meaning, can have no application. The only way that the penal statute could apply would be to consider petitioner's motor freight truck as a stagecoach. The only similarity between a motor freight truck and a stagecoach is that both of them run on wheels. The uses to which they are put are far different. The language used in the penal death statute does not fairly include a motor freight truck. Judge Bratton, writing for a majority of the court below, has thus extended the operation of the penal death statute (36-101) far beyond what it actually says, and in the name of construction has not only extended the effect of the statute but stretched it so far out of shape as to make it unrecognizable to the members of the Territorial Legislature which originally passed it. As so interpreted, its meaning is distorted and its effect has been extended so as to violate the spirit, if not the letter, of Article 4, Section 18, of the Constitution of New Mexico, which provides:

> "No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full."

There is a further rule of statutory construction which has been adopted by the courts of New Mexico, and it should have been followed in deciding the instant case in the court below, namely, the doctrine of *ejusdem generis.* This doctrine is stated in Corpus Juris as follows:

> "By the rule of construction known as *ejusdem generis,* where general words follow the enumera-

> tion of particular classes of persons or things, the general words will be construed as applicable only to the persons or things of the same general nature or class as those enumerated, and this rule has been held especially applicable to penal statutes." 59 C. J., Section 581, page 981.

Said rule of construction has been adopted by the Supreme Court of New Mexico. *Grafe v. Delgado,* 30 N. M. 150, 228 Pac. 601; *Maxwell Lumber Company v. Connally,* 34 N. M. 562, 287 Pac. 64. Under such rule of construction the phrase "other public conveyance" as used in said penal death statute (36-101) should be limited to conveyances like or analogous to a stagecoach.

Corpus Juris says of the word "stagecoach":

> "A coach or other carriage running regularly from one place to another for the conveyance of passengers; a coach that regularly carries passengers from town to town; a coach which is used by the owner to carry passengers from one point to another; any carriage that travels by set stages; a vehicle that starts from some one point at certain stated intervals." 58 C. J., page 1314, Section 4.

A stage coach is defined in the following cases: *Talcott Mountain Turnpike v. Marshall,* 11 Conn. 185; *Burton v. Monticello & Turnpike Company,* ..... Ky. ....., 173 S. W. 144; *Burton v. Monticello & Turnpike Company,* ..... Ky. ....., 109 S. W. 319; *Cincinnati L. & S. Turnpike Company v. Neil,* 9 Ohio 11.

It is true that the old time stagecoach probably carried not only passengers but also mail or baggage, but it certainly was not employed to carry heavy freight regularly. The word "stagecoach" connotes a vehicle of light con-

struction, built for what was great speed in its time, and fitted out to carry passengers. The modern motor freight truck hardly conjures up a picture or vision of a fast moving coach laden with passengers, but rather, suggests the old-time covered wagon which was designed to carry heavy loads. If contemporary writers are to be believed, especially the writers of fiction, the old-time stagecoach sometimes carried gold shipments, United States mail and the hand baggage of its passengers, but it was not designed for, nor used as a vehicle for carrying heavy loads of freight. It was the "Streamliner" of its day. The stagecoach was substantially unlike a freight truck.

Other jurisdictions have considered somewhat similar questions and have applied the doctrine of *ejusdem generis*. *Pulom v. Jocob Dold Packing Co.* 182 Fed. 356; *Lipscomb v. H. & T. C. Railroad Co.*, 95 Tex. 5, 64 S. W. 923; *Goldsmith v. Orange Belt Securities* (Fla.) 156 So. 35; *O'Connor v. Great Lakes Pipeline Company*, 63 Fed. 523; *Mitchell v. New York Life Insurance Co.*, 75 Fed. (2) 107; *Mallory v. Pioneer Southwestern Stages*, 54 Fed. (2) 559; *Farmers' & Mechanics' National Bank v. Hanks*, 104 Tex. 320, 137 S. W. 1120; *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. 749; *North American Accident Insurance Company v. Pitts*, (Ala.) 104 So. 21, 40 A. L. R 1171; *Washington Electric Vehicle Transpartation Co. v. District of Columbia*, 19 App. D. C. 462.

In the case of *McBoyle v. United States*, 283 U. S. 25, 75 L. Ed. 816, this Honorable Court had a somewhat similar question before it. In that case, the National Motor Vehicle Theft Act (the Dyer Act) was before the court for construction, and this Honorable Court in an opinion by the late, great Mr. Justice Holmes held that said Act

did not apply to theft of an airplane. Under the Dyer Act, as it then was written, the term "motor vehicle" was said to include an automobile, automobile truck, automobile wagon, motorcycle, *or any other self-propelled vehicle not designed for running on rails.* That Act was prospective in its nature and the definition of a motor vehicle was certainly more comprehensive than the phrase "stagecoach or other public conveyance," and yet, Mr. Justice Holmes, speaking for this Honorable Court, held that since an airplane was substantially unlike the other named vehicles that the Dyer Act did not apply to the theft of an airplane.

The majority opinion in the court below cited the case of ***Mallory v. Pioneer Southwestern Stages,*** (C. C. A. 10th) 54 Fed. (2) 559, as sustaining the judgment in the instant case; but a careful reading of the opinion in the Mallory case shows that no question was raised by either party as to whether the passenger motor bus involved in that case came within the meaning of said penal death statute, 36-101. A careful reading of the case shows that the question was not actually raised or decided because both parties and the court seemed to assume that a passenger motor bus did come within said statute. Moreover, even if a motor bus does come within said penal death statute it does not follow that a motor freight truck should. A motor bus engaged in the transportation of passengers is very similar in its usage to the old-time stagecoach, while a motor freight truck, engaged solely in carrying heavy loads of freight, is substantially dissimilar to the stagecoach.

After all, in arriving at a correct decision in the instant case it is essential to ascertain the legislative intent, and

we think one of the most significant things in ascertaining the legislative intent was well stated by Judge Phillips in his dissenting opinion, as follows:

> "If the statute is to be construed as held by the majority, the owner or operator of a freight truck is placed in a special category and his liability for wrongful death is limited to $7500. On the other hand, a private owner or operator of a truck or an operator of a truck as a private carrier, who negligently causes a wrongful death, would come within Sec. 36-102, N. M. Stat. Ann. 1929, and would be liable for full compensatory damages which in most cases of wrongful death, would substantially exceed $7500. A carrier of passengers by train, stage, or bus might suffer an accident where a large number of passengers would be killed and where the aggregate liability would be very large. There is some reason to limit the liability of such a carrier. No such reason exists with respect to a freight truck which does not carry passengers. Moreover, the public highways belong to the public and their primary and preferred use is for private purposes. Their use for purposes of gain is special and extraordinary. It is unreasonable and unjust to prefer the public carrier making use of the public highway for the purposes of gain which is a special and extraordinary use, by limiting his liability for wrongful death to $7500 and subjecting the private user, for whom the highway is primarily provided, to unlimited liability for wrongful death. I cannot think it was intended by the legislature to subject private operators of trucks on the public highways to unlimited liability in damages for wrongful death and to limit the liability of the public operators of trucks to $7500. Such a limitation in favor of the public carrier would be manifestly unreasonable and unjust and I do not think an intent to so prefer should be attributed to the legislature in the absence of plain language in

the statutory enactment manifesting such intent." (R. 213-214.)

In the majority opinion, Judge Bratton brushes aside this line of reasoning with the statement: "The suggestion seems to proffer its own answer. That is a question of policy for the legislature, not the courts." (R. 208.) We think Judge Bratton's statement begs the question and assumes that the legislature meant to include a motor freight truck; whereas, as Judge Phillips pointed out, it was a highly important consideration in trying to ascertain the legislative intent.

It is a well established rule in statutory construction that where a statute is adopted from another state or territory, the construction placed on it by such state or territory is also adopted, unless some good reason appears for not following such construction. *Palmer v. Town of Farmington*, 25 N. M. 145, 179 Pac. 227; *Chetham-Strode v. Blake*, 19 N. M. 335, 142 Pac. 1130; *Reymond v. Newcomb*, 10 N. M. 151, 61 Pac. 205;;*Henrietta Mining, etc., Co., v. Gardner*, 19 S. Ct. 327, 173 U. S. 123, 43 L. Ed. 637; *Willis v. Eastern Trust Company*, 18 S. Ct. 347, 169 U. S. 295, 42 L. Ed. 752; *Hardenbergh v. Ray*, 14 S. Ct. 305, 151 U. S. 112, 38 L. Ed. 93.

The New Mexico penal death statute (36-101) was adopted from the State of Missouri. Thus, in *Romero v. Atchison, Topeka & Santa Fe Railway Company*, 11 N. M. 679, 72 Pac. 37, it is said:

> "Many laws of this territory have been borrowed from the State of Missouri, and, as the statute now under consideration is identical with that of Missouri upon this subject, it will be conceded that this is one

> of the statutes which we borrowed from Missouri; and, if so, the rule is to adopt the construction of the act of the Supreme Court of the state from which it was borrowed."

The Missouri death statute was construed in the case of *Drolshagen v. Union Depot Railroad Company*, 186 Mo. 258, 85 S. W. 344. That was a case brought for the death of plaintiff's son because of alleged negligence of a motorman or operator of a street car of defendant. The Supreme Court of Missouri held that the motorman of a street car is not a driver within the meaning of the death statute giving an action for death from the negligence *"of any driver of any stage coach or other public conveyance."*

The case just cited was decided by the Supreme Court of Missouri on December 22, 1904, and in the following year the legislature of Missouri, evidently because of said decision, amended their death statute so that the act was made to apply to operators of street cars, electric or terminal cars or trains, automobiles and motor cars and thus first brought street cars and motor vehicles used as public conveyances within its operation. *Page 135, Laws of 1905*, State of Missouri. The State of New Mexico has not seen fit to include motor vehicles, automobiles or trucks although the original act was copied from Missouri by New Mexico in 1882.

Now Judge Bratton, in the majority opinion of the court below, said that the rule of statutory construction here contended for did not apply because the Drolshagen case was decided long after the statute was enacted by the territorial legislature of New Mexico. That is true, but Judge Bratton overlooks the fact that at the time New

Mexico became a state in 1912, the people of New Mexico in adopting a constitution for their state also adopted the laws of the territory. Article 22, Section 4, New Mexico Constitution provides:

> "All laws of the Territory of New Mexico in force at the time of its admission into the Union as a state, not inconsistent with this constitution, shall be and remain in force as the laws of the state until they expire by their own limitation, or are altered or repealed; and all rights, actions, claims, contracts, liabilities and obligations, shall continue and remain unaffected by the change in the form of government."

Thus, it will be seen that the people of New Mexico re-adopted the penal death statute, Section 36-101, some seven or eight years after the decision of the Drolshagen case in Missouri. We, therefore, respectfully insist that the people of New Mexico, at the time of the admission of New Mexico as a state, adopted the construction of the penal death statute placed upon it by the Supreme Court of Missouri in 1904 and the legislature of the State of Missouri in 1905.

In the case of *Palmer v. Town of Farmington*, 25 N. M. 145, 179 Pac. 227, the Supreme Court of New Mexico construed a statute of New Mexico which had been adopted from an Arkansas statute, and applied the rule of statutory construction here contended for. In the course of the opinion, Judge Roberts, speaking for the Supreme Court of New Mexico, said:

> "This case has been cited with approval in later cases in the same state and has never been departed from. *Bell v. Phillips*, 116 Ark. 167, 172 S. W. 864;

Riddle v. Bailey, 197 S. W. 27, 130 Ark. 161; the Supreme Court of Arkansas having thus held that the statute required the signers of the petition to be, not only the owners of real property within the district to be improved, but actual residents therein, presumptively, when the Legislature of this state adopted the statute, it intended that it should receive a similar construction, and no controlling reason has been advanced by appellees in support of a different interpretation.

"Another significant fact is that the Legislature of Arkansas, by act of March 27, 1905 (Laws 1905, p. 300), amended the statute under consideration in the Cotter Case by striking out the word "resident," so that the statute read, "When any ten owners of real property in such city or incorporated town, or any portion thereof, shall petition," etc. Our Legislature, in adopting the statute, elected to take the original statute, rather than the amended one." 179 Pac. 231.

So, the people of New Mexico in 1912 at the time New Mexico became a state chose to adopt the original Missouri statute which did not include motor freight trucks and like vehicles, rather than the amended Missouri statute of 1905.

For the reasons set out above, we most respectfully submit that the petition for certiorari should be granted, and that the judgment insofar as the death action is concerned should be reversed; that Judge Phillips, in his dissenting opinion correctly decided the case.

V.

CONCLUSION

WHEREFORE, petitioner respectfully prays that writ of certiorari be granted and that upon hearing of this cause, the judgment below as to the death action be

reversed and judgment be here rendered against petitioner for said sum of $600 only; and that petitioner recover his costs in the Circuit Court of Appeals and in this Honorable Court, and that petitioner have such other relief as he may be entitled to, either at law or in equity.

ROBERT L. HOLLIDAY,
El Paso, Texas,

HAROLD L. SIMS,
El Paso, Texas,
Attorneys for Petitioner.

Robert L. Holliday, one of the counsel preparing the foregoing brief and petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same and that such petition and brief are not interposed for delay.

ROBERT L. HOLLIDAY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

BENJAMIN CAIN,
doing business as
CAIN'S TRUCK LINES,
Petitioner

v.

CLARA BOWLBY,
Respondent

No. .....

Receipt of a copy of the petition for certiorari and supporting brief and the record is hereby acknowledged, and further notice of filing and presentation of such petition and brief is waived; and the Honorable Clerk of the Supreme Court may submit same within twenty days from date of filing as provided in Paragraph 3 of Rule 38 of the Supreme Court of the United States.

JULIAN P. HARRISON,
El Paso, Texas,

W. C. WHATLEY,
Las Cruces, New Mexico,
Attorneys for Respondent.